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Supreme Court, U.S.
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NO. 00-1260

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Petitioner,

v.

MARK JAMES KNIGHTS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization headquartered in Charlottesville, Virginia. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of certiorari in the United States Supreme Court in more than two dozen cases, and certiorari has been accepted in several significant constitutional cases. *See Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989); *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998); and *Good News Club v. Milford Central School*, 121 S.Ct. 2093 (2001). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court in cases involving the rights of the accused.[2] Institute attorneys currently handle several hundred cases nationally,

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[1] The Solicitor-General of the United States and counsel for Respondent have consented to the filing of this brief. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 529 U.S. 472 (2000), *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Florida v. J.L.*, 529 U.S. 266 (2000); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001), and *Illinois v. McArthur*, 531 U.S. 326 (2001).

including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The issue presented by this Petition, the degree to which a probationer can be searched "any time of the day or night by any peace officer," is a question of great concern, insofar as it touches upon how society deals with offenders and assures itself that the offender does in fact comply with conditions of probation while on a discretionary grant of probation. Counsel for *amicus* and The Rutherford Institute have conducted extensive research on state statutory authority for probation searches. Because of the breadth of its knowledge on this subject, the Rutherford Institute believes that its insights on this issue will be helpful to understand more accurately the legal environment in California with respect to that issue. Sup. Ct. Rule 15.2.

SUMMARY OF ARGUMENT

This Court has consistently held that for a search to be valid, it must either comply with the Fourth Amendment or be legislatively, and expressly, authorized. Of the several states, District of Columbia and the territories of the United States, only three states, including California, permit search of a probationer any time of the day or night by any peace officer. Of a large number of state supreme courts that have considered the issue, all but three have rejected such a scheme as unconstitutional. The Ninth Circuit Court of Appeals' decision is therefore consistent with stare decisis from this Court and an overwhelming majority of state supreme courts. As California has not legislatively authorized search and seizure any time of the day or night by clear and unequivocal language for those on probation, the court should affirm the decision of the Ninth Circuit based on stare decisis.

ARGUMENT

I.

THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH STARE DECISIS OF THIS COURT AND A MAJORITY OF THE STATE COURTS THAT HAVE CONSIDERED THE ISSUE

A. There Must Be A Clear, Express, Statutory Authorization For A Fourth Amendment Waiver To Be Effective

While statutory authorization of warrantless searches is not the *sine qua non* of a valid search, in the absence of an express statutory authorization, traditional Fourth Amendment rules must apply. *Colonnade Corp. v. United States*, 397 U.S. 72 (1970). In *Colonnade*, a case arising under 26 USC §§ 5301(c), 5146, and 7606 for possible violations of the Internal Revenue Code, the agents sought evidence of violations and demanded entry to inspect pursuant to a statutory authorization, which provided for sanctions on refusal to permit entry but did not expressly provide for a warrantless entry to search. The Court noted "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." *Colonnade*, 397 U.S. at 76. It went on, however, to note "that administrative entry, without consent, upon the portions of the commercial premises not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure...." *Id.* at 76-77. The Court concluded, "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various

restrictive rules apply." *Id.* at 77; *cf. United States v. Biswell*, 482 U.S. 691 (1972) (express Congressional authorization; regulated industry). In *Payton v. New York*, 445 U.S. 573 (1980), the Court struck down a state statute that permitted warrantless searches absent probable cause. *See also G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (warrantless entry and seizure of assets on company property unlawful); *See v. Seattle*, 387 U.S. 541 (1967) (warrantless administrative inspection in commercial building unlawful); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); and *cf. Illinois v. Krull*, 480 U.S. 340, 349-355 (1986) (statutory scheme for inspection of junk dealers held unconstitutional under state law) with *New York v. Burger* 482 U.S. 691, 699-703 (1987) (statutory inspection scheme of junk dealers upheld). Consequently, where no express legislative authorization exists that is reasonably related to the purposes of a probation program, traditional Fourth Amendment procedures must apply to avoid delegating unfettered discretion to peace officers.

All States make some provision for probation. Not all States are consistent with what conditions should be required, and some have not made any statutory provisions at all for conditions.[3]

[3] That there should be legislation, and uniformity in the legislation, is obvious in light of the states' various enactments of the Uniform Act for Out-Of-State Parolee Supervision. See United States Code and state statutory provisions cited in Appendix A. The Act does not provide for any particular conditions of probation, except as follows: "(2) That each receiving state will assume duties of visitation and of supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees." Cal. Pen. Code. § 11177. This provides for discriminatory treatment. For example, a probationer from Illinois on supervision in California is subject to searches "any time of the day or night by any probation officer or peace officer" whereas a probationer from California on supervision

Insofar as Fourth Amendment search issues are concerned, the most common condition found is consistent with the Model Penal Code § 301.1(2)(j) "to report as directed to the Court or the probation officer and to permit the officer to visit his home...." Many States adopting the (j) provision add "and elsewhere." A few States provide, in one form or another for the MPC § 301.1(2)(l) "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." *See* Appendix B. Only two states, Illinois and North Carolina, have a detailed procedure for warrantless searches by a probation officer. Many States expressly provide for drug testing. No state, by statute, expressly permits a warrantless search by peace officers. *See* Appendix B.

in Illinois is subject to "visits by the probation officer at the probationer's home or place of work at reasonable times." Twenty-seven jurisdictions have express statutory provisions for either visits, searches, or both, limited to the probation officer; one permits the probation officer to use peace officers; none permit a peace officer to conduct searches. Twenty-seven jurisdictions have no express statutory provision for visits or searches by anyone; of these, one, New Mexico, by administrative regulation, prohibits a probation officer from conducting searches, requiring the officer to pursue normal search procedures, but by case law allows a probation officer to conduct searches. Courts in sixteen of the fifty-four jurisdictions surveyed have considered the issue. Two, Arkansas and Georgia, give greater latitude than expressly permitted by statute. In the Arkansas case, on state grounds, the scope of the statute limiting searches to probation offers was not discussed; the discussion centered only on federal grounds and the 4th Amendment, pursuant to Griffin. Eight found that the conditions imposed were rationally related to a legitimate purpose of rehabilitating the probationer. Only five were faced with a state statute which had no express provisions for visits or searches and of those five, only California permits "blanket searches." See footnote 5 and Appendix B.

A requirement that the several States by legislation authorize in the first instance the waiver of Fourth Amendment rights, with necessary safeguards, is essential in view of the importance of this issue, in order to give clear notice to those who must administer the program and those who must abide by the terms, provide clear guidance to probationers on their duties and responsibilities, provide for uniform treatment of probationers who are subject to relocation and transfer, and to assure that appropriate consideration is given to third parties and potential bystanders whose rights should not be impaired by unreasonable conditions of probation and parole.

B. This Court Held in *Griffin* that a State Does Have a Limited Interest in Close Supervision of Those *In Custodia Legis*

Regardless of the applicable standard, a probationer's, or parolee's home, like everyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (probationer).[4] Supervision is a special need of the state permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large, but the permissible degree is not unlimited. 483 U.S. at 875. The "special needs" of a probation system make the warrant system impracticable and justify the replacement of the standard of probable cause by "reasonable ground." 483 U.S. at 875-76.

[4] The Court did not reach the question as to when a police officer could search. In *Griffin*, the police officer reported that he thought the probationer had a gun, but it was the probation officer, not the police, who conducted the search.

In most jurisdictions, the result reached in *Griffin v. Wisconsin* had been a foregone conclusion, with other courts having moved in the direction of requiring at a minimum that a peace officer at least have consulted with a probation officer.[5] It would appear that

[5] *E.g., State v. Cullison*, 173 N.W.2d 533 (Iowa 1970) (parolee; unreasonable search); *People v. Way*, 319 N.Y.S.2d 16 (New York 1971)(parolee; limited scope); *People v. Peterson*, 233 N.W.2d 250, 254-55 (Mich. 1975) (blanket searches by peace officers unlawful); *Temez v. State*, 534 S.W.2d 686 (Tex. 1976); *State v. McGivney*, 585 P.2d 767 (Ore 1978); *State v. Holm*, 579 P.2d 860 (Ore. 1978) (probation Officer; "any peace officer" too broad); *Dearth v. State*, 390 So.2d 108 (Fla. App. 1980) (conditions of probation; fact that probationer agreed to "unfettered discretion" does not make void condition voluntary); *State v. Fogarty*, 610 P.2d 140 (Mont. 1980) (probation; search condition unconstitutional); *State v. Fields*, 686 P.2d 1379, 1389 (Haw. 1984)(probation; probable cause required); *Commonwealth v. La France*, 525 N.E.2d 379 (Mass. 1988) (search by probation officer); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990); *State v. Gallagher*, 675 P.2d 429 (N.M. 1984); *State v. Cumming*, 262 N.W.2d 56 (S.D. 1978) (probation officer consent required); *State v. Gardner*, 619 P.2d 847 (N.M. 1980) (state statute silent; administrative code required probation officer to seek search warrant, but actual condition imposed provided that probation officer could conduct search; search led by probation officer valid); *State v. Perbix*, 331 N.W.2d 14 (ND. 1983) (search consistent with statutes permitting probation officer to search) [*see now* N.D.C.C. 15A-1343 adopting MOC (j)]. *But see People v. Bravo*, 43 Cal.3d 600 (1987); *Wilson v. State*, 752 S.W.2d 46 (Ark. 1988) [*see now* A.C.A. § 5-4-303 adopting MPC (j)]; *Allen v. State*, 369 S.E.2d 909 (Ga. 1988) [*see now* O.C.G.A. § 45-8-35 adopting MPC (j); *State v. Finnegan*, 439 N.W.2d 496 (Neb. 1989) (search "by any peace officer" limited to part of drug rehabilitation program only); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990) (drug search as part of drug rehabilitation program approved). *See generally*, Annotation, *Validity of Requirement that, As Condition of Probation, Defendant Submit to Warrantless Searches*, 79 A.L.R. 3d 1083;

California is the first state ever to expressly authorize "blanket searches" of probationers without a warrant by any peace officer. *People v. Bravo*, 43 Cal.3d 600 (1987). *Bravo*, however, was decided only several days after *Griffin*, and cites *Griffin* only once. 43 Cal.3d at 608. *Bravo* conflicts with *Griffin* in that California had no state detailed regulation of probation, unlike Wisconsin, which authorized a departure from Fourth Amendment warrants. In *Griffin*, there was an objective standard, approved by the Court, which had to be met over and above being a mere parolee, and there were detailed regulations covering the subject.

The Oregon experience is illuminating. The Supreme Court of Oregon noted that while the courts had the power to impose conditions of probation, and that while a "search and seizure" condition may be appropriate, there was no express legislative authority, such conditions could not be unlimited, and that the courts were not the means of defining that limit in the first instance, but did so reluctantly. Evidently the Oregon legislature took the hint because it appears to have enacted legislation permitting a "search and seizure" condition "by the probation officer, or any peace officer assisting the probation officer." *State v. Hovater*, 588 P.2d 56 (1978); *State v. Davis*, 597 P.2d 1280 (1979).

The great weight of authority thus holds that neither a parolee nor a probationer may be abused during authorized searches. Given the purpose of probation and parole, the fact that the probation and parole officers know their own charges better than anyone else, and certainly more than a magistrate knows about unknown citizens when issuing a search warrant, the Fourth Amendment requires at a minimum that peace officers contact the

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Annotation, *Validity, Under Fourth Amendment, of Warrantless Search of Parolee or His Property by Parole Officer*, 32 A.L.R. Fed 155.

parole or probation officer for permission to conduct a search of the parolee or probationer, and no search unless so authorized is valid, absent exigent circumstances, because the administration of conditions of parole and probation are a non-delegable duty necessary to rehabilitate the offender, yet prevent the exploitation of such persons and the abuse of those not on probation. This result is consistent with, and required by, this Court' enunciated rule of law which forbids the granting of "unfettered discretion" to peace officers in the area of law enforcement. *E.g.*, *Florida v. Wells*, 95 U.S. 1 (1990) (inventory of containers where no state policy authorizes inventory); *Payton v. New York*, 45 U.S. 573 (1980); 3 Rotunda, CONSTITUTIONAL TREATISE, § 20.9, p. 34. It is for the courts to supervise probationers, through the probation office, and not for peace officers, and such a delegation is simply not permitted.

C. CALIFORNIA HAS NO DETAILED RULES AND REGULATIONS FOR THE IMPOSITION OF A STATUTORY WAIVER OF THE FOURTH AMENDMENT FOR THOSE ON PROBATION

California's legislature has not clearly and unequivocally authorized a condition of probation searches "by any peace officer at any time of the day or night with or without a warrant, as a Condition of Probation. *See generally,* Cal. Pen. C. §§ 1192.3(a), 1202.7, 1202.8(a), 1203(a), 1203.016[6], 1203.1, 1203a, 1210.1.

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[6] This section, Electronic Home Detention Act of 1988, provides for home detention and electronic monitoring as a means of reducing local jail over crowding. It permits a peace officer, subject to the Detention Administrator, to inspect the home for compliance and take the person into custody without an arrest warrant when the system is not operational.

There is no basis for the Attorney General's reliance on Penal Code § 1000.12 or § 3067. The former has to do with Delayed Entry of Judgment (DEJ), a form of diversion wherein the defendant, without a judgment being entered, is placed under the custody of a probation officer for a period of rehabilitation. It is designed solely for child abuse/molestation cases, and not available to other offenses. California Stats. 1995, Chap. 935 (Appendix, at C1), which enacted § 1000.12 (DEF) and two versions of § 1203.066 (Probation).[7] Chapter 935 provides for "search any time of the day or night" for those on DEF, but not for those on probation. Surely, with the condition under consideration for DEJ, the legislature could not have overlooked the possibility and failed to duplicate the condition for probation, had they desired it. It is circumstantial evidence, in light of the sister state legislation and other Supreme Court decisions, to reject the holding of *People v. Bravo*, 43 Cal.3d 600 (1987) and not to vest peace officers with unfettered discretion in cases of probation. The latter provisions, Pen. Code § 3067, is not relevant because that provision deals with those on parole, *i.e.* a period of supervision after having served a period of time in state prison.

This court's decision in *Colonnade, supra*, is directly on point: absent legislative approval in the first instance, the regulation is void for lack of authority. Moreover, as discussed above, an overwhelming number of state supreme courts agree that such a provision is unconstitutional and therefore void.

[7] This case involved a question concerning conditions of probation, neither DEJ nor parole. However, it is difficult in light of the overwhelming evidence that unfettered discretion for such services is impermissible to justify such a condition with respect to either Pen. Code § 1000.12(c)(4)(4) or § 3067.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Court's *amicus* respectfully submits that this Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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August 21, 2001

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APPENDIX B

Section 1: Jurisdictions incorporating Model Penal Code §301.1(2)(j), requiring probationers "to report as directed to the Court or the probation officer and to permit the officer to visit his home ....":

State	As of 1993	As of 2001
Ark	Code Ann. § 54-303	To Section 2a
Ga	O.C.G.A. § 45-8-35	To Section 2
Ind	A.I.C. 35-38-2-2.3	To Section 2
Kan	S.A. 21-4610	To Section 2
Ky	RS 533.030	To Section 2
La	RS. 15:574.4	To Section 2
Me	R.S.A. § 1204	To Section 2
Neb	R.R.S. 1993, § 29-2262	R.R.S. 1993, § 29-2262(2)(k)
N.J	S.A. 2C:45-1	S.A. 2C:45-1(b)(10)
N.Y	Penal Law § 65.10	To Section 2
Pa.	42 Pa CSA § 9754	42 Pa CSA § 9754(C)(10)

Section 2: Jurisdictions incorporating Model Penal Code §301.1(2)(j) and adding "and elsewhere:"

State	As of 1993	As of 2001
US	18 USC, § 3563	18 USC, § 3563
Al	From Section 6	15-22-52(4)
Ark	Code Ann. § 54-303	Code Ann. § 54-303
Colo	R.S.A. § 16-11-204(i)	16-11-204(2)(x)
Fla.	S.A. § 948.03	S.A. § 948.03(1)(b)
Ga	From Section 1	O.C.G.A. § 42-8-35(4)
Hawaii	RS § 706-624	RS § 706-624(f)
Ill.	730 ILCS 5/5-6-3	730 ILCS 5/5-6-3(a)(5) & 3.1
Ind.	From Section 1	AIC 35-38-2-2.3(a)(10)
Kan.	From Section 1	S.A. 21-4610(c)(4)
Ky	From Section 1	RS 533.030(2)(j)

La	From Section 1	CCRP 895(4)
Me	From Section 1	17-49-1204.2-A(j)
Miss	Code 1972, § 47-7-35	Code 1972, § 47-7-35(e)
N.D.	C.C. § 12.1-32-07*	C.C. § 12.1-32-07.4(h)
N.Y	From Section 1	Penal Law § 65.10.2(a)
Ore	RS § 137.540	RS § 137.540
Vt	Stat 28 § 252*	Stat 28 § 252(b)(10)*

* Limited to Reasonable times.

Section 2a: Jurisdictions using an analogous Model Penal Code § 301.1(2)(j), requiring probationers "to report as directed to the Court or the probation officer and to permit the officer to visit his work, and elsewhere ....":

State	As of 1993	As of 2001
Ark	New	Code Ann. § 5-4-303(2)(j)

Section 3: Jurisdictions incorporating Model Penal Code §301.1(2)(l), requiring probationers "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience":

State	As of 1993	As of 2001
US	18 USC, § 3563	18 USC, § 3563(b)
Ark	Code Ann. § 54-303	Code Ann. § 54-303(e)(1)
Hawaii	RS § 706-624	RSs § 706.624(2)
Ill	730 ILCS 5/5-6-3	730 ILCS 5/5-6-3
N.J	N.J.S.A. 2C:45-1(b)(12)	N.J.S.A. 2C:45-1(b)(12)
Pa.	Stat. 42 § 9754	42 Pa CSA § 9754(c)(13)

Section 4: Jurisdictions with detailed procedures for warrantless searches by a probation officer:

State	As of 1993	As of 2001
Ill	730 ILCS 5/5-6-3	730 ILCS 5/5-6-3(a)(5)
N.C.	G.S. § I5A-1343(b)(5)	G.S. § I5A-1343(b)(3)*
Ohio	New	ORC 2951.02(C)(2)*

* Limited to searches by probation officers

Section 5: Jurisdictions that expressly provide for drug testing:

State	As of 1993	As of 2001
US	18 USC, § 3563	18 USC, § 3563
Ariz	R.S. §13-914	R.S. §13-914
Fla.	S.A. § 948.03	S.A. § 948.03(2)
Hi.	RS § 706-624	RS § 706-624
Il.	CS 5/3-6-3 S.H.A. 730	CS 5/3-6-3 S.H.A. 730
Ind.	A.I.C. 35-38-2-2.3	A.I.C. 35-38-2-2.3(a)(10)
Md	New	Art 27, § 64(a)(1)(ii)1.
Me	R.S.A. § 1204	R.S.A. § 1204
MI	New	773.1(2)(g)
Miss	Code 1972, § 47-7-35	Code 1972, § 47-7-35
Neb.	R.R.S. 1993, § 29-2262	R.R.S. 1993, § 29-2262(2)(n)
Nev	R.S. 176.185 to 176.227	R.S. 176.185 to 176.227
N.D.	C.C. § 12.1-32-07	C.C. § 12.1-32-07
Ok.	New	St. Anno. 2.2-991, 991A.1.k., .p, & .y
Ore.	RS § 137.540	RS § 137.540
Puerto Rico	Law 34 § 1027a	Law 34 § 1027a
Tex	Ann. C.Cr.P. art. 42.12, § 11	Ann. C.Cr.P. art. 42.12, § 11

Section 6: Jurisdictions silent on the issue of consent to search:

State	As of 1993	As of 200i
US	18 USC, § 3563	18 USC, § 3563
Ala.	Code 1975, § 15-22-29	Code 1975, § 15-22-29
Alaska	Stat. § 12.55.100	Stat. § 12.55.100
Ariz.	R.S. §§ 12-299, et seq.	R.S. §§ 13-901 et seq.
Cal.	Pen. C. §§ 11175to11179	Pen. C. §§1203, 1203.1, 11175to11179
Conn.	G.S.A. § 53a-30	G.S.A. § 53a-30
Del.	Code 11 § 4332	Code 11 § 4332
D.C.	Code 1981, §§ 24-101 to 24-106	Code 1981, §§ 24-101 to 24-106
Idaho	C. §§ 19-2601 to 19-2607	C. §§ 19-2601 to 19-2607
Iowa	C.A. § 907.6	C.A. § 907.6
Md.	Code 1957, art. 27, § 641, 641A	Code 1957, art. 27, § 641, 641A
Mass	G.L.A. C. 276, § 387, 387A	G.L.A. C. 276, § 387, 387A
Mich	C.L.A. § 771.3	C.L.A. § 771.3
Minn	S.A. § 609.135	S.A. § 609.135
Mo.	V.A.M.S. § 217.705	V.A.M.S. § 217.705, 559.016
Mont.	CA §§ 46-1-202, 46-18-201, 46-23-1001	CA §§ 46-1-202, 46-18-201, 46-23-1001
N.H.	RSA *651:2*	RSA *651:2*
N.M	.S.A. 1978, § 31-21-21	.S.A. 1978, § 31-21-21
Ohio	R.C. § 2951.02	R.C. § 2951.02????(c)(1)
Okl	St. Ann. 22 § 991a	St. Ann. 22 § 991a
R.I.	G.L. 1956 §§ 12-19-8, 21-284.21	GL. 1956 § 12-18.1-1
S.C.	Code 1976 § 24-21-430	Code 1976 § 24-21-430
S.D.	C.L. 23A-27-18	C.L. 23A-27-18
Tenn	C.A. § 40-35-303	C.A. § 42.01
Utah	Code 1953 § 77-18-1	Code 1953 § 77-18-1
Virgin	Code S § 3711	Code S § 3711

Islands		
Va.	Code 1950, § 19.2-303	Code 1950, §§ 19.2-123, 19.2-303
Wash.	Rev. Code § 9-95-210	Rev. Code § 9-95-210
W.Va.	Code § 62-12-9	Code § 62-12-9
Wis.	S.A. § 973.09	S.A. § 973.09
Wyo.	Stat. 1977 § 7-13-30	Stat. 1977 § 7-13-30

Section 6: Jurisdictions expressly permitting search and seizures by any peace officer at any time:

State	As of 1993	As of 2001
CA	-----	P.C. § 1000.12(c)(4)(D)*

*DEJ, not probation, and limited to those involved in child abuse/molestation.

APPENDIX C

CALIFORNIA STATUTES

BILL NUMBER: SB 816 CHAPTERED 10/16/95
[**1995** Stats.] CHAPTER 935

FILED WITH SECRETARY OF STATE
OCTOBER 16, **1995**

APPROVED BY GOVERNOR OCTOBER 15, **1995**

PASSED THE SENATE SEPTEMBER 13, **1995**

PASSED THE ASSEMBLY SEPTEMBER 1, **1995**

AMENDED IN ASSEMBLY AUGUST 31, **1995**

AMENDED IN ASSEMBLY AUGUST 24, **1995**

AMENDED IN ASSEMBLY JULY 5, **1995**

AMENDED IN SENATE MAY 23, **1995**

AMENDED IN SENATE MAY 17, **1995**

INTRODUCED BY Senator Peace

(Coauthor: Senator Kopp)

(Coauthor: Assembly Member Rainey)

FEBRUARY 23, **1995**

An act to amend Section 13964 of the Government Code,

to amend Sections 288.1, 1000.12, and 1203.066 of the Penal Code, and to amend Section 656 of the Welfare and Institutions Code, relating to children.

LEGISLATIVE COUNSEL'S DIGEST

SB 816, Peace. Children: sexual abuse.

(1) Existing law authorizes the State Board of Control to provide assistance to, among others, derivative victims of crimes, including the parent of a child who has been sexually abused, unless the board makes certain findings, including the fact that the parent failed to cooperate with a law enforcement agency in the apprehension and conviction of the perpetrator. This bill would specify that a parent shall not be considered uncooperative under these provisions if the parent cooperates with the prosecution or Child Protective Services by providing assistance to law enforcement in the disposition of the case.

(2) Existing law provides for the granting of probation to, and deferred entry of judgment and treatment of, specified child **molester** who may be feasibly rehabilitated in recognized treatment programs. This bill would revise the standards applicable to a recognized treatment program, as defined.

(3) Existing law provides that the court may not suspend the sentence of a specified child **molester** until the court obtains a report on the offender's mental condition from a reputable psychiatrist or psychologist, as provided. This bill instead would provide that the court may not suspend the sentence of a specified child **molester** until the court obtains that report from a reputable psychiatrist or psychologist, or from a recognized treatment program referred to in (2) above. The bill would make various

technical changes.

(4) This bill would incorporate additional changes in Section 656 of the Welfare and Institutions Code enacted by AB 817 (Ch. 313, Stats. **1995**). This bill would incorporate additional changes in Section 1203.066 of the Penal Code enacted by AB 1491 (Ch. 48, Stats. **1995**). It would also incorporate additional changes in that section proposed by AB 95, to be operative only if AB 95 and this bill are both chaptered and become effective on January 1, 1996, and this bill is chaptered last.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 13964 of the Government Code is amended to read:

*****

SEC. 2. Section 288.1 of the Penal Code is amended to read:

*****

SEC. 3. Section 1000.12 of the Penal Code is amended to read:

1000.12. (a) It is the intent of the Legislature that nothing in this chapter deprive a prosecuting attorney of the ability to prosecute any person who is suspected of committing any crime in which a minor is a victim of an act of **molester**, abuse, or neglect to the fullest extent of the law, if the prosecuting attorney so chooses.

(b) Except as provided in subdivision (c), in lieu of

prosecuting a person suspected of committing any crime, involving a minor victim, of an act of abuse or neglect, the prosecuting attorney may refer that person to the county department in charge of public social services or the probation department for counseling or psychological treatment and such other services as the department deems necessary. The prosecuting attorney shall seek the advice of the county department in charge of public social services or the probation department in determining whether or not to make the referral.

(c) (1) In lieu of trial, the prosecuting attorney may make a motion to the trial court to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of **molester** or sexual abuse, provided that the defendant pleads guilty to all crimes and enhancements charged. Upon that motion and defendant's plea of guilty to all charges and enhancements, the court may defer entry of judgment, contingent upon the defendant's referral to, and completion of, a treatment program approved by the prosecuting attorney. Upon the defendant's successful completion of the treatment program, and upon the positive recommendation of the treatment program authority and the motion of the prosecuting attorney, but no sooner than five years from the date of the defendant's referral to the treatment program, the court shall dismiss the charge or charges against the defendant.

(2) Upon any failure of treatment under the program described in paragraph (1), the prosecuting attorney may make a motion to the court for entry of judgment and the court shall, upon a finding of failure of treatment based on a preponderance of evidence, enter judgment upon the defendant's pleas and admissions, and schedule a sentencing hearing as otherwise provided in this code.

(3) The office of the prosecuting attorney shall promulgate eligibility standards for deferred entry of judgment and treatment of defendants described in paragraph (1), which shall include, but not be limited to, all of the following:

(A) Deferred entry of judgment for the defendant is in the best interests of the minor victim.

(B) Rehabilitation of the defendant is feasible in a recognized treatment program, as defined in Section 1203.066, designed to deal with child **molester**, abuse, or neglect, as specifically related to the charges made.

(C) There is no threat of harm to the minor victim if entry of judgment is deferred.

(D) No person shall be deemed eligible for deferred entry of judgment under this section unless he or she pleads guilty to all charges and enhancements.

(E) Deferred entry of judgment shall not apply to any person who is charged under subdivision (b) of Section 288, or any sexual offense involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the minor victim or another person.

(F) Any person who applies for deferred entry of judgment under this section shall also

meet all of the requirements for the counseling program delineated under Section 1000.13.

(4) Deferred entry of judgment shall be granted upon the following terms:

(A) Defendant shall seek and participate in a rehabilitation program as prescribed by the district attorney.

(B) Defendant shall not use, handle, or have in his or her possession marijuana, narcotics, dangerous drugs, or controlled substances of any kind, unless lawfully prescribed for the defendant by a licensed physician.

(C) Defendant shall not associate with known or reputed users or sellers of marijuana, dangerous drugs, or narcotics, or be in places where narcotics or dangerous drugs are present.

(D) Defendant shall submit his or her person, property, automobile, and any object under his or her control to *search* and seizure in or out of the presence of the defendant, by any law enforcement officer or probation officer.

(E) Unification with the family or unsupervised contact with the minor victim or any other minor shall be prohibited except upon recommendation of the treatment program and motion of the district attorney and order of the

court.

(F) Any violation of the law constitutes a failure of treatment.

SEC. 4. Section 1203.066 of the Penal Code is amended to read:

1203.066. (a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:

(1) A person who is convicted of violating Section 288 or 288.5 when the act is committed by the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(2) A person who caused bodily injury on the child victim in committing a violation of Section 288 or 288.5.

(3) A person who is convicted of a violation of Section 288 or 288.5 and who was a stranger to the child victim or befriended the child victim for the purpose of committing an act in violation of Section 288 or 288.5, unless the defendant honestly and reasonably believed the victim was 14 years of age or older.

(4) A person who used a weapon during the commission of a violation of Section 288 or 288.5.

(5) A person who is convicted of committing a violation of Section 288 or 288.5 and who has been previously convicted of a violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286, 288, 288.5, 288a, or 289, or of assaulting another person with intent to commit a crime specified in this paragraph in violation of Section 220, or who has been previously convicted in another state of an offense which, if committed or attempted in this state, would constitute an offense enumerated in this paragraph.

(6) A person who violated Section 288 or 288.5 while kidnapping the child victim in violation of Section 207, 208, or 209.

(7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim.

(8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age.

(9) A person who, in violating Section 288 or 288.5, used obscene matter, as defined in Section 311, or matter, as defined in Section 311, depicting sexual conduct, as defined in Section 311.3.

(b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not apply when the court makes all of the following findings:

(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household.

(2) A grant of probation to the defendant is in the best interest of the child.

(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child **molestation** immediately after the grant of probation or the suspension of execution or imposition of sentence.

(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. While removed from the household, the court shall prohibit contact by the defendant with the victim, except the court may permit the supervised contact, upon the request of the director of the court ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. As used in this paragraph, "contact with the victim" includes all physical contact, being in the presence of the victim, communication by any means, any communication by a

third party acting on behalf of the defendant, and any gifts.

(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant. The court shall order the psychiatrist or psychologist who is appointed pursuant to Section 288.1 to include a consideration of the factors specified in paragraphs (2), (3), and (4) in making his or her report to the court.

(d) The existence of any fact that would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(e) As used in this section and in Section 1000.12, the following terms apply:

(1) "Recognized treatment program" means a program with substantial expertise in the treatment of children who are victims of sexual abuse, their families, and offenders, that demonstrates to the court all of the following:

(A) An integrated program of treatment and assistance to victims and their families.

(B) A treatment regimen designed to specifically address the offense.

(C) The ability to serve indigent clients.

(2) "Integrated program of treatment and assistance to victims and their families" means that the program provides all of the following:

(A) A full range of services necessary to the recovery of the victim and any nonoffending members of the victim's family, including individual, group, and family counseling as necessary.

(B) Interaction with the courts, social services, probation, the district attorney, and other government agencies to ensure appropriate help to the victim's family.

(C) Appropriate supervision and treatment, as required by law, for the offender.

(f) For purposes of this section and Section 1000.12, a program that provides treatment only to offenders and does not provide an integrated program of treatment and assistance to victims and their families is not a recognized treatment program.

SEC. 5. Section 1203.066 of the Penal Code is amended to read:

1203.066. (a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:

(1) A person who is convicted of violating Section 288 or 288.5 when the act is committed by the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(2) A person who caused bodily injury on the child victim in committing a violation of Section 288 or 288.5.

(3) A person who is convicted of a violation of Section 288 or 288.5 and who was a stranger to the child victim or befriended the child victim for the purpose of committing an act in violation of Section 288 or 288.5, unless the defendant honestly and reasonably believed the victim was 14 years of age or older.

(4) A person who used a weapon during the commission of a violation of Section 288 or 288.5.

(5) A person who is convicted of committing a violation of Section 288 or 288.5 and who has been previously convicted of a violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286, 288, 288.5, 288a, or 289, or of assaulting another person with intent to commit a crime specified in this paragraph in violation of Section 220, or who has been previously convicted in another state of an offense which, if committed or attempted in this state, would constitute an offense enumerated in this paragraph.

(6) A person who violated Section 288 or 288.5 while kidnapping the child victim in violation of Section 207, 209, or 209.5.

(7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim.

(8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age.

(9) A person who, in violating Section 288 or 288.5, used obscene matter, as defined in Section 311, or matter, as defined in Section 311, depicting sexual conduct, as defined in Section 311.3.

(b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the

victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not apply when the court makes all of the following findings:

(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household.

(2) A grant of probation to the defendant is in the best interest of the child.

(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child **molestation** immediately after the grant of probation or the suspension of execution or imposition of sentence.

(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. While removed from the household, the court shall prohibit contact by the defendant with the victim, except the court may permit supervised contact, upon the request of the director of the court-ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. As used in this

paragraph, "contact with the victim" includes all physical contact, being in the presence of the victim, communication by any means, any communication by a third party acting on behalf of the defendant, and any gifts.

(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant. The court shall order the psychiatrist or psychologist who is appointed pursuant to Section 288.1 to include a consideration of the factors specified in paragraphs (2), (3), and (4) in making his or her report to the court.

(d) The existence of any fact that would make a person ineligible for probation under subdivision (a) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(e) As used in this section and in Section 1000.12, the following terms apply:

(1) "Recognized treatment program" means a program with substantial expertise in the treatment of children who are victims of sexual abuse, their families,

and offenders, that demonstrates to the court all of the following:

(A) An integrated program of treatment and assistance to victims and their families.

(B) A treatment regimen designed to specifically address the offense.

(C) The ability to serve indigent clients.

(2) "Integrated program of treatment and assistance to victims and their families" means that the program provides all of the following:

(A) A full range of services necessary to the recovery of the victim and any nonoffending members of the victim's family, including individual, group, and family counseling as necessary.

(B) Interaction with the courts, social services, probation, the district attorney, and other government agencies to ensure appropriate help to the victim's family.

(C) Appropriate supervision and treatment, as required by law, for the offender.

(f) For purposes of this section and Section 1000.12, a program that provides treatment only to offenders and does not provide an integrated program of treatment and assistance to victims and their families is not a recognized treatment

program.

SEC. 6. Section 656 of the Welfare and Institutions Code, as amended by Chapter 313 of the Statutes of **1995**, is amended to read:

656. A petition to commence proceedings in the juvenile court to declare a minor a ward of the court shall be verified and shall contain all of the following:

(a) The name of the court to which it is addressed.

(b) The title of the proceeding.

(c) The code section and subdivision under which the proceedings are instituted.

(d) The name, age, and address, if any, of the minor upon whose behalf the petition is brought.

(e) The names and residence addresses, if known to petitioner, of both of the parents and any guardian of the minor. If there is no parent or guardian residing within the state, or if his or her place of residence is not known to petitioner, the petition shall also contain the name and residence address, if known, of any adult relative residing within the county, or, if there are none, the adult relative residing nearest to the location of the court.

(f) A concise statement of facts, separately stated, to support the conclusion that the minor upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted.

(g) The fact that the minor upon whose behalf the petition is brought is detained in custody or is not detained in custody, and if he or she is detained in custody, the date and the precise time the minor was taken into custody.

(h) A notice to the father, mother, spouse, or other person liable for support of the minor child, that:

(1) Section 903 may make that person, the estate of that person, and the estate of the minor child, liable for the cost of the care, support, and maintenance of the minor child in any county institution or any other place in which the child is placed, detained, or committed pursuant to an order of the juvenile court;

(2) Section 903.1 may make that person, the estate of that person, and the estate of the minor child, liable for the cost to the county of legal services rendered to the minor by a private attorney or a public defender appointed pursuant to the order of the juvenile court;

(3) Section 903.2 may make that person, the estate of that person, and the estate of the minor child, liable for the cost to the county of the probation supervision of the

minor child by the probation officer pursuant to the order of the juvenile court; and

(4) the liabilities established by these sections are joint and several.

(i) In a proceeding alleging that the minor comes within Section 601, notice to the parent, guardian, or other person having control or charge of the minor that failure to comply with the compulsory school attendance laws is an infraction, which may be charged and prosecuted before the juvenile court judge sitting as a municipal court judge. In those cases, the petition shall also include notice that the parent, guardian, or other person having control or charge of the minor has the right to a hearing on the infraction before a judge different than the judge who has heard or is to hear the proceeding pursuant to Section 601. The notice shall explain the provisions of Section 170.6 of the Code of Civil Procedure.

(j) If a proceeding is pending against a minor child for a violation of Section 594.2, 640.5, 640.6, or 640.7 of the Penal Code, a notice to the parent or legal guardian of the minor that if the minor is found to have violated either or both of these provisions that (1) any community service which may be required of the minor may be performed in the presence, and under the direct supervision, of the parent or legal guardian pursuant to either or both of these provisions; and

(2) if the minor is personally unable to pay any fine levied for the violation of either or both of these provisions, that the parent or legal guardian of the minor shall be liable for payment of the fine pursuant to those sections.

(k) A notice to the parent or guardian of the minor that if the minor is ordered to make restitution to the victim pursuant to Section 730.6, or to pay fines or penalty assessments, the parent or guardian may be liable for the payment of restitution, fines, or penalty assessments.

SEC. 7. Section 5 of this bill incorporates amendments to Section 1203.066 of the Penal Code proposed by both this bill and AB 95. It shall only become operative if (1) both bills are enacted and become effective on January 1, 1996, (2) each bill amends Section 1203.066 of the Penal Code, and (3) this bill is enacted after AB 95, in which case Section 4 of this bill shall not become operative.